No. 93-706

Supreme Court, U.S.
FILED
JAN 7 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

MICHAEL D. GRIFFES, COMMISSIONER OF THE VERMONT DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

GREG R. BARRINGER and JUDITH M. BARRINGER,

Respondents.

Opposition to Petition for a Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Second Circuit correctly interpreted Vermont law in holding that Respondents had no right to a hearing or judicial review, as the Tax Injunction Act requires?

2. Whether a state motor vehicle tax, which fails the internal consistency test and discriminates against interstate commerce by not providing a tax credit, thereby violates the Commerce Clause?

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COUNTER-STATEMENT OF THE CASE

Petitioner's Statement of the Case is argumentative, incomplete, and misleading. Several key facts are omitted, presumably because they do not advance the Petitioner's cause. The following points are essential to a proper understanding of the case:

1. The Vermont motor vehicle purchase and use tax does not provide a credit for sales taxes already paid to other states. Although Petitioner never mentions it, *cf.* Petition at 3, the fact that the Vermont motor vehicle tax does not provide a sales tax credit is at the heart of this case. Formerly, the State of Vermont exempted non-residents who had paid sales taxes on automobiles purchased elsewhere, but that exemption was repealed on September 1, 1980. *See* Vt. Stat. Ann. tit. 32, § 8911(6) (repealed). Since then, non-residents who move to Vermont have been forced to pay two taxes on their cars: a sales tax to the state of origin and a five percent use tax to Vermont. *Id.* § 8903(b).[1] By contrast, Vermont residents who buy their cars in Vermont owe no use tax. They pay only a single five percent sales tax. *Id.*

2. The Vermont motor vehicle use tax has already been considered once by this Court and found wanting.

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[1] Non-residents must register their cars within six months of moving in. Vt. Stat. Ann. tit. 23, §§ 301 and 4(30). Substantial civil and criminal penalties apply if the tax is not paid. Vt. Stat. Ann. tit. 32, § 8920 (25 percent civil penalty plus interest); § 8909 (drivers' license suspension); tit. 23, § 421 (criminal sanction).

Although Petitioner does not say so, this Court held in *Williams v. Vermont*, 472 U.S. 14 (1985), that Vermont's motor vehicle purchase and use tax violated the Equal Protection Clause on its face because it provided a sales tax credit for residents but not non-residents who purchased cars in other states. *Id.* at 22, 27, 28. Without such a credit, the Court explained:

> . . . the use tax exceeds the usual justifications for such a tax. A use tax is generally perceived as a necessary complement to the sales tax, designed to "'protect a state's revenues by taking away the advantages to residents of traveling out-of-state to make untaxed purchases, and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices.'" This customary rationale for the use tax has no application to purchases made out-of-state by those who were not residents of the taxing State at the time of purchase. These home-state transactions cannot be seen as lost Vermont sales, and are certainly not ones lost as a result of Vermont's sales tax. Imposing a use tax on them in no way protects local business. In short, in its structure, this sales and use tax combination is exactly the opposite of the customary provisions: there is no disincentive to the Vermont resident's purchasing outside the State, and there is a penalty on those who bought out-of-state but could not have been expected to do otherwise. The first provision limits local commerce, the second does not help it.

472 U.S. at 24-25 (citations omitted).[2]

3. This Court noted in *Williams* that Vermont's use tax raises serious questions under the Commerce Clause. As this Court pointed out in *Williams*, the requirement of a sales and use tax credit under the Commerce Clause has significant support. Such a requirement "has been endorsed by at least one state court, was advocated 20 years ago in the much-cited Report of the Willis Subcommittee, is adopted in the Multi-state Tax Compact, and has significant support in the commentary." 472 U.S. at 22. Because *Williams* was decided on Equal Protection Clause grounds, however, the Court found it unnecessary to reach the Commerce Clause issue. *Id.*

4. Following this Court's decision in *Williams*, the State of Vermont expanded the tax by denying a tax credit to residents and non-residents alike. Rather than providing a tax credit to eliminate the unconstitutional discrimination found by this Court in *Williams*, the State of

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[2] Petitioner argues that this language precludes any finding of discrimination against interstate commerce by the Court of Appeals. *Cf.* Pet. at 13-14. The argument deserves short shrift. The quoted passage explains that imposing a compensating use tax on non-residents who purchase cars in their home states does not protect local merchants from losing sales to local consumers because of lower sales taxes in other states. The passage does not address the point that such a tax actually provides an incentive for non-residents moving to Vermont (or residents away from home) to wait to purchase their cars in Vermont.

Vermont elected instead to deny a tax credit to residents and non-residents alike who purchase and first register cars outside the state.[3] The State's new practice only heightens the double taxation problem under the Commerce Clause. Now few individuals or none receive a tax credit for sales taxes on cars purchased elsewhere. As Petitioner's counsel has acknowledged, now "that [tax] credit may be more theoretical than real." Opp. App. at 2.[4]

5. Respondents initially brought suit in state court to challenge Vermont's failure to grant a tax credit. Respondents moved to Vermont in the fall of 1990. After being told by the Vermont Department of Motor Vehicles that they were not entitled to a tax credit for sales taxes already paid on their car in Connecticut, they brought suit for declaratory and injunctive relief in Vermont Superior Court on June 14, 1991. In seeking injunctive relief rather than an administrative refund, the Barringers were mindful that the

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[3] Shortly after *Williams* was handed down, the State Agency of Transportation adopted an administrative regulation stating that anyone who registers a car in another state is not entitled to a tax credit from Vermont. The regulation effectively amends a statutory provision granting the tax credit to residents without regard to registration. *Cf.* Vt. Agency of Transportation, Dept. of Motor Vehicles, Rule 86-28-E (July 5, 1985), with Vt. Stat. Ann. tit. 32, § 8911(9). *Cf. Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987) (attempt to retain previously invalidated tax in masked form).

[4] "Opp. App." refers to the Appendix of Respondents' Brief in Opposition to Petition for a Writ of Certiorari.

Vermont Commissioner of Motor Vehicles had routinely denied tax refunds to other individuals without providing a hearing. Opp. App. 3-19. In moving for a preliminary injunction, the Barringers offered to pay the disputed tax into state court until the case was resolved.

Rather than join the issue and accept payment of the tax into state court, Petitioner moved to dismiss the action on July 9, 1991, for lack of subject matter jurisdiction. In view of the Petitioner's motion, the Barringers concluded that their right to a full hearing and judicial relief in state court was, at best, uncertain. Accordingly, they withdrew their state court complaint and instead filed this action in federal district court on August 8, 1991.[5]

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[5] Attempting to paint Mr. and Mrs. Barringer as scofflaws, Petitioner states that "they operated the vehicle for two years, even after the Connecticut registration expired, without registering it in Vermont." *Cf.* Petition at 4. There is no evidence to support that statement. Petitioner apparently draws an inference from the fact that Respondents' counsel objected to a question put by the District Court to as to whether Mrs. Barringer had been unable to operate the car without a registration. However, the District Court withdrew the question in response to the objection. Pet. App. 68-70.

As noted, the Barringers offered from the outset to pay the disputed tax into court until the case was resolved. Indeed, the Barringers were so concerned about not operating their automobile illegally that they asked the Second Circuit for relief after the District Court denied their motion for a preliminary injunction and their motion for an injunction pending appeal. On December 22, 1992, the Second Circuit granted the Barringers' request, ordering

(continued...)

REASONS FOR DENYING CERTIORARI

The Second Circuit Court of Appeals concluded in this case that, under the Commerce Clause, Appellees Greg and Judith Barringer should not have to pay a motor vehicle use tax in the amount of $280 in order to register their car in Vermont, where no credit was granted for sales taxes which they had already paid to Connecticut. The State of Vermont imposes a five percent use tax on new residents registering their cars for the first time in Vermont, without granting a credit for sales taxes already paid elsewhere. Vermont residents who have paid a sales tax to Vermont are exempt from the use tax, however. As the Court of Appeals said, absent a credit the Vermont tax fails the internal consistency test and discriminates against interstate commerce, in violation of the Commerce Clause. Pet. App. at 46, 50.

Review of this case is not appropriate on any grounds. Petitioner has identified no lower court decision which is inconsistent with the Court of Appeals' opinion on the merits or on jurisdiction. Nor has he pointed to any other tax, either in Vermont or elsewhere, which could be affected by either decision. Apart from having no impact beyond the

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[5](...continued)
the State to issue a car registration upon payment of the disputed tax into court. The Barringers promptly paid the amount and have been driving with a legal registration ever since.

particular tax in dispute, the Court of Appeals was correct in striking down the tax under four recent precedents of this Court.[6] The State is now free to raise highway revenues in a constitutional manner and to correct its motor vehicle tax statute to prevent future federal court challenges. For all of these reasons, certiorari should be denied.

I. THERE ARE NO "SPECIAL AND IMPORTANT REASONS" FOR GRANTING CERTIORARI IN THIS CASE.

A. There Is No Conflict Among The Courts.

Petitioner points to no conflict among the courts or any other "special and important" reason which justifies review in this case. As far as Respondents know, the only other court to apply the Commerce Clause to a sales and use tax statute which did not provide a tax credit also struck down the statute, and that was more than 20 years ago. *See Montgomery Ward & Co., Inc. v. State Board of Equalization*, 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (1969), *cert. denied* 396 U.S. 1040 (1970).[7] Leading commentators have

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[6] *See Goldberg v. Sweet*, 488 U.S. 252 (1988); *American Trucking Assns. v. Scheiner*, 483 U.S. 266 (1987); *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232 (1987); and *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (all holding that state taxes which fail the internal consistency test violate the Commerce Clause).

[7] Two other state courts refused to apply the Commerce Clause in similar tax challenges, each more than a decade ago. *See* (continued...)

also agreed that a sales and use tax credit is required by the

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[7](...continued)
Genex/London, Inc. v. Kentucky Board of Tax Appeals, 622 S.W. 2d 499 (Ky. 1981), and *J.C. Penney Co., Inc. v. Hardesty*, 264 S.E. 2d. 604, 613-14 (W.Va. 1979). *Genex* held that the Commerce Clause did not apply because the items on which the tax was levied had "come to rest" inside the state by the time the tax attached. *Id.* at 504. That reasoning has been discredited by this Court, *see, e.g., D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 28-29 (1988), and it is not urged as a ground for review by the Petitioner here.

In *J.C. Penney*, the West Virginia Supreme Court held that no interstate commerce was involved where a taxpayer was denied a tax credit for sales taxes previously paid on her car to New Jersey, because she was not "a manufacturer." *See* 264 S.E. 2d at 613. This Court has made clear that the Commerce Clause applies to all movement across state lines, however, whether commercial in nature or not. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255-56 (1964). Once more, Petitioner does not seek review on this ground.

Petitioner does argue that Respondents lack standing to raise a Commerce Clause challenge under *Goldberg*, *cf.* Pet. at 10, but his argument is not well-taken. *Goldberg* did allow state residents to challenge a tax on interstate telephone calls on internal consistency grounds, but it found the tax satisfied that test because it provided a credit. 488 U.S. at 261. The question of standing arose only in connection with discrimination against interstate commerce. However, the discrimination alleged in *Goldberg* involved an abstract claim that state residents who make a high percentage of long-distance calls pay a higher "per-unit" charge than those who make only local calls. *Id.* at 265-66. In this case, by contrast, there is actual discrimination between in-state and out-of-state motor vehicle purchases. The reasoning in *Goldberg* thus does not apply.

Commerce Clause. *See, e.g.*, Hellerstein, "Complementary Taxes As A Defense To Unconstitutional State Tax Discrimination," 39 Tax Lawyer 405, 407 (Spring 1986); McCray, "Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation," 17 Urban Lawyer 529, 564 (1985); "Developments in the Law: Federal Limitations on State Taxation of Interstate Business," 75 Harvard Law Review 953, 999-1000 (1962).[8] That result is consistent

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[8] As the commentators point out, the failure to require a sales tax credit would give so-called "market states" a strong incentive to impose sales taxes without credits in order to favor local merchants and raise tax revenues, since such states will have the least to fear from retaliatory legislation. *See* J.F. Due, *State and Local Sales Taxation* 250 (1971); M. Cruz, *The Use Tax: Its History, Administration, and Economic Effects* 48 n. 32 (1941); Dane, "Movable Property in Interstate Commerce," 48 J. Taxation 176, 179-80 (1978); Comment, "Compensating Use Taxes," 18 Ark. L. Rev. 321, 328-29 (1964-65); Note, "Economic Neutrality and the Compensating Use Tax," 16 Stan. L. Rev. 1016 (1964). *Cf. Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 440 (1827) (Marshall, J.) (absent Commerce Clause "[t]he great importing states would levy a tax on the non-importing states, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports").

with the established views of this Court.[9] In short, the Court of Appeals decision is not controversial.

B. Other State Sales And Use Tax Statutes Are Not Affected.

Sales and use tax credits have not been an issue in the courts because virtually every state has adopted them.

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[9] Even before the internal consistency test, this Court had stricken state taxes which posed the risk of double taxation. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981) (invalidating use tax on outer continental shelf natural gas which fell largely on non-residents); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 641 (1963) (holding use tax on out-of-state goods based on raw material and labor costs unconstitutional where sales tax on in-state goods based on cost of raw material only); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 170 (1954); *J.D. Adams Manufacturing v. Storen*, 304 U.S. 307, 312-13 (1938) (disallowing gross receipts tax on manufacturers if goods either manufactured or sold in state, based on risk of double taxation).

Petitioner's argument that the Court of Appeals' decision conflicts with *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), is not well-taken. *Cf.* Pet. at 11-12. The two grounds on which the Court of Appeals based its decision here, internal consistency and discrimination against interstate commerce, were not even issues in *Container Corp.* *See* 463 U.S. at 163. That portion of *Container Corp.* to which Petitioner refers involved the external consistency test, a point which the Court of Appeals here did not consider because it did not have to. *Container Corp.* also involved a tax on income rather than goods, and it applied the Foreign Commerce Clause rather than the Domestic one. The Court emphasized that these differences were significant. *See* 463 U.S. at 185-86; 188; 192.

Following the lead of the 1967 Multi-state Tax Compact, 49 states-- including Vermont-- now grant a tax credit against their general sales and use tax to non-residents who purchase and first use property outside the state. *See* 1 CCH Multi-state Sales Tax Guide ¶ 916 (1993).[10] Nevada, the only state which denies such a credit, does not apply its use tax at all to property purchased out-of-state which, at the time of purchase, was not purchased for use in Nevada. *See* Nevada Department of Taxes, "Tips To Taxpayers No. 65" (Dec. 1983). Accordingly, the result in this case has little or no practical significance beyond the specific Vermont tax statute in dispute.

C. Federal Jurisdiction Will Not Be Enlarged.

The Court of Appeals held that federal jurisdiction was available in this case because, as a matter of Vermont state law, Respondents had no clear right to a hearing or judicial review, as the federal Tax Injunction Act requires. Pet. App. 9-15. Petitioner does not quarrel with the lower court's interpretation or application of the Tax Injunction Act.[11]

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[10] The instant case does not involve Vermont's general sales and use tax but a specific "purchase and use tax" on motor vehicles. *See Williams*, 472 U.S. 18 n. 2 (pointing out differences between two taxes).

[11] Nor could he. *Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946), established that a state must provide a full hearing and right to judicial review in order to preclude federal jurisdiction under the Tax Injunction Act. *See also Rosewell v. La*

(continued...)

Rather, he argues that an agency hearing and judicial review were in fact available under Vermont law. *Cf.* Pet. at 6-8. While Respondents believe that the Petitioner's view is mistaken,[12] the point here is that Petitioner's position turns on issues of state rather than federal law. Such questions have no national significance and little if any beyond this case. To resolve them is not a purpose of certiorari, *see* Sup. Ct. R. 10, especially since the Second Circuit is competent and experienced in addressing issues of Vermont law.

Nor will the Court of Appeals' decision trigger a flood of federal suits. Petitioner points to no other state tax, in Vermont or any other state, which does not clearly provide a statutory right to judicial review. According to the CCH Multi-state Sales Tax Guide, every jurisdiction which

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[11](...continued)
Salle National Bank, 450 U.S. 503, 514, 515 n. 31 (1982); *California v. Grace Brethren Church*, 457 U.S. 393, 414 n. 31 (1982).

[12] So does the state's own Department of Taxes. In two cases decided after *Williams*, the Vermont Department of Taxes has held that it "lacks jurisdiction to judge the constitutionality of the statutes it administers." *See In re Maher*, No. ATC-92-46 (Vt. Dept. Taxes, Sept. 23, 1993) and *In re Hirsch*, No. ATC-91-48 (Vt. Dept. Taxes, July 16, 1993). *See* Opp. App. at 27, 36. The taxpayers in both cases argued that they were entitled to refunds because Vermont taxes interest on federal bonds less favorably than interest on state and local obligations. Opp. App. at 22, 33. Based on lack of jurisdiction, the refunds were denied. *Id.* at 28, 36-37.

imposes a general sales and use tax, including Vermont, has explicitly established a statutory right of judicial review for that tax. *See* CCH Multi-state Sales Tax Guide State Explanations, ¶ 19,400, Vols. 1-4 (1993). Vermont itself also provides explicit statutory procedures for a hearing and judicial review with respect to its state income tax, Vt. Stat. Ann. tit. 32, § 5885; property tax, Vt. Stat. Ann. tit. 32, §§ 4401-4469; estate and gift tax, Vt. Stat. Ann. tit. 32, § 7489; meals and rooms tax, Vt. Stat. Ann. tit. 32, § 9275; and property transfer tax, Vt. Stat. Ann. tit. 32, § 9617, among others. The State can avoid further federal challenges to its motor vehicle tax simply by enacting a provision for a hearing and judicial review with respect to that statute. In these circumstances, Petitioner's statement that, under the Court of Appeals decision, "the federal district court will quickly become the forum of choice for all manner of state tax cases" must be dismissed as hyperbole. *Cf.* Petition at 9.

D. Petitioner Has A Wide Range Of Options Available For Raising Highway Revenue.

Petitioner complains that, if the State is forced to grant a tax credit, Respondents and other non-residents will end up paying nothing for their use of Vermont roads. *Cf.* Pet. at 11-12. That is not the case in other states, and it need not be the case in Vermont.[13] A gasoline tax is one obvious

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[13] Petitioner chides the Court of Appeals for not providing a list of tax options which the State of Vermont might pursue in response to its ruling. Pet. at 11. As this Court made clear in

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example of a levy which is closely related to highway use; does not run afoul of the internal consistency test; and does not discriminate against interstate commerce. Vermont has long had such a tax and could increase it to recoup lost revenues. *See* Vt. Stat. Ann. tit. 23, §§ 3101 *et seq.* (1987). Alternatively, Petitioner might consider an annual registration fee based on miles driven, size and weight of vehicle, and the value of the vehicle. This Court has previously approved such taxes under the Commerce Clause. *See Bode v. Barrett*, 344 U.S. 583 (1953) (annual license tax based on weight); *Capital Greyhound Lines v. Brice*, 339 U.S. 542, 546-47 (1950) (title fee based on value of vehicle in conjunction with mileage charge); *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245 (1928) (mileage tax). Once more, Vermont already imposes an annual motor vehicle registration fee which could be increased by the legislature. Vt. Stat. Ann. tit. 23, §§ 361 *et seq.*

In short, this Court need not intervene to protect the State fisc. Vermont has numerous ways to raise revenues in a constitutional manner. A flat one-time tax will not pass muster, however, even if it is characterized as a "user fee" rather than what it really is-- a compensating use tax. *Cf. American Trucking Assns. v. Scheiner*, 483 U.S. 266, 282-84 (1987) (striking down flat fee without credit); *Sprout v. South*

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[13](...continued)
Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978), however, it is for legislatures rather than courts to determine tax policy. *Id.*

Bend, 277 U.S. 163 (1928) (invalidating flat tax on intrastate and interstate busses).

CONCLUSION

The decision of the Court of Appeals does not conflict with any decision of any other Court, including this one. Nor will the decision have any impact beyond the particular dispute in this case. The writ should be denied.

Dated: Burlington, Vermont
January 4, 1994

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GREG R. BARRINGER	*	
JUDITH M. BARRINGER	*	
	*	
v	*	
	*	
MICHAEL D. GRIFFES	*	CIVIL FILE NO. 91-231

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
Friday, August 14, 1992
Burlington, Vermont

BEFORE:

THE HONORABLE FRED I. PARKER
Chief District Judge

APPEARANCES:

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* * *

Barringer, G. - Redirect

[p. 36] MR. GRIFFIN: I think one of the arguments that the -- that the plaintiffs are making is that is a discrimination argument, so the State -- I have had a chance to think about that since our telephone conference, and I think what the State would propose to do after today is to do some brief additional discovery, probably request for admissions from the -- from the plaintiffs, and to prepare affidavits with respect to the credits that the plaintiffs are complaining about.

There are some narrow categories of credits, for example, to veterans, possibly to residents who purchase cars out of state, although I think that that credit may be more theoretical than real. And one final piece of evidence, probably present initially, at least by way of affidavit, in a summary judgment context, would be something from an economist who could testify as to what burden, if any, is -- this purchase and use tax places on commerce.

STATE OF VERMONT [1]
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DEPARTMENT OF MOTOR VEHICLES
120 State Street, Montpelier, Vermont 05603-0001

July 24, 1985

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Quechee, VT 05059

Dear Mr. Vickery and Ms. Kobert:

Senator Peter Welch has requested that I contact you to explain the present status of the Motor Vehicle Purchase and Use Tax in light of the recent decision of the U.S. Supreme Court.

The Court's decision, while stating that the statute in question was unconstitutional on its face, was that there was not a sufficient record before it to determine whether or not the statute was unconstitutional as administered. For that reason, the case was remanded to the Vermont Supreme Court for further proceedings.

As a result, there has been no change in the manner in which the tax is administered nor will there be any until such time as the case is finally resolved and only then if the final

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[1] The correspondence in this Appendix was included in the Joint Appendix submitted to the Court of Appeals and was produced by the State in related litigation.

decision requires changes. For that reason, no refunds are being made or contemplated at this time.

Sincerely yours,

William H. Conway, Jr.
Commissioner

WHC/mts

CC: Senator Peter F. Welch

Peter F. Welch
President pro tempore

P.O. Box 858
White River Junction, VT 05001

(802) 295-9347

Committees
Rules
Chairman
Finance
Vice-Chairman
General Affairs

STATE OF VERMONT
SENATE CHAMBER
MONTPELIER
05602
(802) 828-2241

July 22, 1985

Commissioner William Conway
Department of Motor Vehicles
Montpelier, VT 05602

Dear Bill:

Re: Mike Vickery/Linda Kobert

Mike Vickery and Linda Kobert of Quechee, Vermont are in that class of people who were compelled to pay a Vermont use tax when they paid one already on their vehicle in the state they purchased it. Mr. Vickery and Ms. Kobert paid approximately $750 on their vehicle in Arizona, and then were required to pay $270 when they arrived in Vermont.

In view of the Supreme Court decision, I am writing to inquire as to whether they will now receive a refund. I believe they certainly should, since the tax was no more fair or correct when they paid it than it is now after the Supreme Court decision.

I'd appreciate if you would contact me and them directly to advise as to what the status is of their claim, and what they must do to further pursue it.

Their address is, P.O. 611, Quechee, VT 05059, telephone 295-1720.

Sincerely,

Sen. Peter Welch
President Pro Tem

PW:cat
392

cc: Mike Vickery and Linda Kobert

App. 7

STATE OF VERMONT
AGENCY OF TRANSPORTATION
DEPARTMENT OF MOTOR VEHICLES
120 State Street, Montpelier, Vermont 05603-0001

February 21, 1986

Evelyn and John Phillips
R.R. 1, Airport Road
Bennington, VT 05201

Dear Mr. and Mrs. Phillips:

This is in response to your letter of February 18, 1986.

By law, anyone who registers a vehicle in this state must pay the motor vehicle purchase and use tax unless specifically exempted. Based upon the information in your letter, it does not appear that you would qualify for any exemption and, therefore, the tax would be due at the time of registration.

You may certainly request a rebate from New York although I suspect that the likelihood of success is not great.

Sincerely yours,

William H. Conway, Jr.
Commissioner

WHC/mts

HEMMINGS MOTOR NEWS
Box 100 - Subscription Department - Bennington, VT 05201

February 18, 1986

Department of Motor Vehicles
State Street
Montpelier, VT 05602

Dear Sirs:

I would like to complain about the current registration policies. We moved to Vermont from New York State bringing with us two cars. To register these cars in Vermont state we had to pay 4% sales tax on the book values of both cars. Consequently it cost us a total of $238.00 to register a 1980 Toyota Tercel and a 1974 Volvo. Both cars were registered in New York state and purchased there. We paid 6 or 7% sales tax in New York on the same vehicles.

My question to you is, is this not double taxation? Am I entitled to a refund on the tax dollars spent? Should I receive some rebate from New York? From Vermont? Or is it hopeless to try to get any of the double tax back?

We would like a response to this letter whether it is positive or negative. Thank you for your time.

Sincerely,

Evelyn and John Phillips
R. R. # 1, Airport Rd.
Bennington, VT 05201

STATE OF VERMONT
AGENCY OF TRANSPORTATION
DEPARTMENT OF MOTOR VEHICLES
120 State Street, Montpelier, Vermont 05603-0001

March 11, 1985

Lewis G. Whitaker, Jr.
RD 2, Hollyhock Hill
Randolph, VT 05060

Dear Mr. Whitaker:

Senator Allen D. Avery requested that I write to you regarding the Motor Vehicle Purchase and Use Tax.

Vermont law provides that registration in this state is conclusive evidence that the tax applies unless specifically exempted by law. Enclosed is a copy of 32 V.S.A. § 8911, the statutory exceptions to the tax. As you will notice, there is no statutory exception which would apply to your situation.

In the past, 32 V.S.A.§ 8911(6) provided an exception for pleasure cars owned by nonresidents if registered and used for at least another state or province. This subsection, however, was repealed effective September 1, 1980. Since that time, an individual moving to Vermont and registering his or her vehicle here has been required to pay a motor vehicle use tax at the time of registration.

Such taxation has been the subject of challenge in the courts and has been upheld by the Vermont Supreme Court. The case is now pending before the U.S. Supreme Court. It is impossible to predict when a decision may be rendered by that court.

In summary then, the use tax imposed at the time you registered your vehicle was proper under Vermont law even though you may have paid a purchase or sales tax in another jurisdiction.

Sincerely yours,

William H. Conway, Jr.
Commissioner

WHC/mts

cc: Senator Allen D. Avery

STATE OF VERMONT

SENATE CHAMBERS
STATE HOUSE **TELEPHONE (802) 828-2231**
MONTPELIER, VERMONT 05602

March 6, 1985

Commissioner William Conway
Department of Motor Vehicles
Montpelier, VT 05602

Dear Bill

Mr. Louis Whitaker, of Randolph, has forwarded a complaint to me regarding having to pay a purchase and use tax on an automobile in order to register it in Vermont, although he purchased the vehicle in another state and had already paid the tax on it.

Mr. Whitaker is quite upset because he feels he has been taxed twice on a single purchase and would like to hear from you as to the state's policy regarding this issue, and if there ever has been a movement for having reciprocal agreements between states so that this does not occur.

I would appreciate a copy of the response to Mr. Whitaker.

Most cordially,

Sen. Allen D. Avery
Orange County

ADA:bek
0163n
cc: Mr. Lewis Whitaker
Hollyhock Hill Road
Randolph, VT 05060

STATE OF VERMONT
AGENCY OF TRANSPORTATION
DEPARTMENT OF MOTOR VEHICLES
120 State Street, Montpelier, Vermont 05603-0001

October 9, 1985

Mr. P. Walker Grant, Jr.
RFD 1, Box 108A
Killington, Vt. 05751

Dear Mr. Grant:

This is in response to your letter of October 6, 1985.

The reports of the U. S. Supreme Court's decision which appeared in the media were somewhat misleading.

The Court held that while the statute appeared unconstitutional on its face, there was no evidence on the issue of whether it was discriminatory as applied. For that reason, the case was sent back to the Vermont court for further proceedings.

The case is now pending in the Washington Superior Court.

Since there has not been a final decision in the case, nothing has changed and the tax is still being collected. No refunds are contemplated at this time.

Sincerely yours,

William H. Conway, Jr.,
Commissioner
WHC/pd

App. 13

P. Walker Grant, Jr.
RFD 1 Box 108A
Killington, VT 05751

October 6, 1985

Commissioner of Motor Vehicles
Department of Motor Vehicles
Agency of Transportation
Montpelier, VT 05601

Dear Sir:

Some time ago I heard a news report regarding the outcome of a suit which found it not constitutional to collect sales tax on a used car when it was registered in Vermont and tax had previously been paid in another state. I have been waiting to hear how you intend to make restitution to those who paid this second tax. Since I haven't heard a thing, I'll come out and ask.

In 1974 I bought a car and paid the sales tax in Connecticut where I lived at the time. Later I moved to New Jersey (and incidentally, paid no second sales tax) and, finally, in 1981 I moved here to Vermont and had to pay sales tax to register the car. How do I go about getting a refund?

Sincerely,

P. Walker Grant, Jr.

STATE OF VERMONT
AGENCY OF TRANSPORTATION
DEPARTMENT OF MOTOR VEHICLES
120 State Street, Montpelier, Vermont 05603-0001

November 14, 1985

Marian East
R.D. 1, Box 136
Bellows Falls, VT 05101

Dear Madam:

This is in response to your recent letter regarding the payment of the Motor Vehicle Purchase and Use Tax.

What you have heard regarding the Court's determination on this issue is not exactly accurate. The U.S. Supreme Court sent the case back to the Vermont courts for further proceedings. That court held that the statute appeared to be discriminatory on its face; however, there was no evidence before the court relative to whether or not the statute was being applied in a discriminatory manner. That issue was the reason for the case being sent back.

As a result of the lack of a final decision, nothing has changed regarding this tax.

For this reason, your request for a refund must be denied.

Sincerely yours,

William H. Conway, Jr.
Commissioner
WHC/mts

Dear Sir:

When my husband and I moved here three years ago we were informed that in order to receive Vermont license plates, etc., we had to pay sales tax again on our Arkansas vehicles. We felt that this was very unfair and strictly illegal. We had paid sales tax in Arkansas on our vehicles upon purchasing them.

We paid the fees very begrudgingly as we needed our vehicles for transportation to work, etc.

We have now heard that this policy has been taken to court and that the court decided that this is definitely illegal. We would like to settle out of court and have our money refunded to us. Enclosed is a copy of our two checks we sent.

Our license plate #'s are (Celica-1979) XU637 and (Toyota Truck-1980) T1573.

Thank you very much.

Marian East
RD 1, Box 136
Bellows Falls, VT 05101

STATE OF VERMONT
AGENCY OF TRANSPORTATION
DEPARTMENT OF MOTOR VEHICLES
120 State Street, Montpelier, Vermont 05603-0001

August 30, 1985

Susan E. Stapleton
77 Pleasant Street, Apt. 2
Woodstock, VT 05091

Dear Madam:

This is in response to your letter of August 28, 1985.

The reports in the media of the recent U.S. Supreme Court decision were somewhat misleading.

The case was sent back to the Vermont court for further proceedings. The court noted in its opinion that the statute in question, in practice, may not operate in a discriminatory manner. The Vermont court will have to develop a record which addresses this issue.

The result of this is that nothing has been changed by the decision. For that reason, no refunds are being made nor can they be considered before the case is finally resolved.

Sincerely yours,

William H. Conway, Jr.
Commissioner

WHC/mts

August 28, 1985

Dept. of Motor Vehicles
Montpelier, VT 05602

To Whom It May Concern:

It has come to my attention that the Dept. of Motor Vehicles has been over-charging new Vermont residents for registering their car by charging a tax on the current value of their car.

I have enclosed a copy of my check for the amount of $100 for the registration of my 1979 Volkswagen Rabbit in January, 1985 and I expect a refund as soon as possible.

Thank you for your cooperation.

Sincerely,

Susan E. Stapleton
77 Pleasant St. Apt. #2
Woodstock, Vermont 05091

STATE OF VERMONT
AGENCY OF TRANSPORTATION
DEPARTMENT OF MOTOR VEHICLES
120 State Street, Montpelier, Vermont 05603-0001

August 30, 1985

Bradley L. Cassella
P.O. Box 438
Stratton Mountain, VT 05155

Dear Mr. Cassella:

This is in response to your letter of August 27, 1985.

The reports in the media of the recent U. S. Supreme Court decision were somewhat misleading.

The case was sent back to the Vermont court for further proceedings. The court noted in its opinion that the statute in question, in practice, may not operate in a discriminatory manner. The Vermont court will have to develop a record which addresses this issue.

The result of this is that nothing has been changed by the decision. For that reason, no refunds are being made nor can they be considered before the case is finally resolved.

Sincerely yours,

William H. Conway, Jr.
Commissioner

WHC/mts

P. O. Box 438
Stratton Mountain, VT 05155
August 27, 1985

Mr. William Conway, Commissioner
State of Vermont
Agency of Transportation
Department of Motor Vehicles
Montpelier, VT 05603

Dear Mr. Conway:

Again, I am writing you in regard to the tax paid on my vehicle when I moved to Vermont.

As the enclosed article indicates, the tax I paid was unjust.

Would you please inform me of the process I should follow to receive this money?

Very truly yours,

Bradley L. Casella

BLC/jc
Enclosure

STATE OF VERMONT

COMMISSIONER OF TAXES

IN RE: David L. and Karen F. Maher
Personal Income Tax
ATC-92-46

DETERMINATION

Introduction

David L. and Karen F. Maher, appearing pro se, appeal the Department of Taxes' adjustments to their personal income tax liability for the year 1991. Mary Bachman, Esq., represents the Vermont Department of Taxes, and Emily Bergquist Tartter serves as hearing officer at the designation of Joyce Errecart, Commissioner of Taxes. The appeal is submitted by the parties for determination without hearing, based upon a stipulation of facts filed with the Department.

The Department's adjustments are affirmed.

Findings of Fact

The following findings of fact are based upon the parties' stipulation of facts.

1. The taxpayers appeal the Department's reduction of the refund requested on their 1991 Vermont individual income tax.

2. The taxpayers received $7,600 of interest income from Federal obligations in 1991.

3. The taxpayers filed their 1991 Vermont individual income tax return on April 9, 1992.

4. The taxpayers reported their actual Federal adjusted gross income ($82,830) and their actual Federal tax ($12,006) on their Vermont return and using these amounts calculated their Vermont tax to be $3,620. As permitted by 32 V.S.A. § 5822, the taxpayers then reduced their Vermont tax by a percentage equal to the ratio of their U.S. government obligation interest to their adjusted gross income. This adjustment reduced their Vermont tax to $3,288 and, after credit for taxes withheld, resulted in an overpayment of $558.

5. Although the taxpayers showed an overpayment of $558, they requested a refund of $886. This refund request is not based on the above calculation, but rather is based on a recalculated Federal tax determined by first reducing their adjusted gross income by their U.S. government interest of $7,600, then calculating a new Federal tax and applying to that figure the Vermont rate for 1991.

6. The Department reduced the taxpayers' refund by $327.56, to $558.44, the refund amount resulting from the statutory adjustment method.

7. The taxpayers filed a timely appeal.

Conclusions of Law

The taxpayers argue that the Department incorrectly reduced their refund under applicable Vermont income tax law for 1991. Alternatively, they argue that the applicable Vermont income tax law is unconstitutional. Their constitutional claim is based upon their assertion that section 5822 of Title 32, as it read for the year at issue, illegally imposed a tax upon their U.S. obligation interest income, and further, that because similar taxation was not imposed on interest from State obligations, the State law at issue unconstitutionally discriminated against Federal obligations.

Vermont's personal income tax system is a "piggyback" system; that is, its income tax is based upon a percentage of the taxpayer's Federal income tax liability. 32 V.S.A. § 5822. Because certain income taxable at the Federal level is not taxable by Vermont, the taxpayer's Vermont income tax liability must be reduced to exclude those items of nontaxable income. One such item of income which may not be taxed by the State is interest income on U.S. government obligations. Under Title 31 of the United States Code, all obligations of the United States are exempt from state and local taxation. The statutory exemption provides,

> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except -

(1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and

(2) an estate or inheritance tax.

31 U.S.C.A. § 3124(a).

There are two possible methods of adjusting for income not taxable by this State, the "adjustment method" and the "recomputation method."

Under the adjustment method the taxpayer begins with actual Federal tax liability, applies the Vermont tax rate, and then reduces the resulting Vermont tax by a fraction which is the ratio of U.S. obligation (or certain other non-Vermont) income to total adjusted gross income. 32 V.S.A. § 5822. (See example below).

Under the recomputation method the taxpayer would recompute Federal tax liability by completing a new Federal return, which omits from adjusted gross income the U.S. obligation interest. Deductions would be applied against this lower adjusted gross income and a new Federal tax then calculated. The Vermont rate would then be applied. This is the method the taxpayers assert is correct.

Under the recomputation method a taxpayer with any deductions will pay less State tax than under the adjustment method. This is due to the fact that the full amount of the taxpayer's deductions are allowed against a reduced amount

of adjusted gross income (that is, adjusted gross income minus U.S. obligation interest).

The following example shows the difference in tax results under the two methods:

Example The following calculations assume a taxpayer with adjusted gross income of $100,000, including $10,000 U.S. obligations interest (10% of AGI), and itemized deductions of $50,000; the Federal tax shown is taken from the Federal tax tables for 1991:

Adjustment method		Recomputation method	
$100,000	AGI	$100,000	AGI
- 50,000	deductions	- 10,000	U.S. interest
		- 50,000	deductions
50,000	taxable income	40,000	taxable income
9,580	Federal tax	6,787	Federal tax
2,868	Vt tax		
- 10%	adjustment for $10,000 U.S. interest		
$2,581	adjusted Vermont tax	$2,002	recomputed Vermont tax

1. Recomputation is not allowed for 1991 income tax.

The taxpayers assert that the recomputation method was available to them for 1991. They base their assertion on an analogy, stating that since taxpayers with non-Vermont municipal bond income must recompute their Federal tax

liability to determine their State liability, so taxpayers with Federal obligation interest should be able to recompute.

The taxpayers' argument, however, ignores two important points. First, the two situations are not analogous. U.S. obligation income is taxed at the Federal level, and must be removed from the equation at the state level; municipal bond income is not taxed at the Federal level, and must be added to the equation at the state level. As a practical matter, both the adjustment method and the recomputation method work to remove U.S. obligation income from the equation; but only the recomputation method works to add back in municipal bond income. This distinction is seen more clearly by trying to apply the adjustment method for municipal bond income. Taking the example above, assume that the taxpayer has no Federal obligation interest, but instead has ten thousand dollars of non-Vermont municipal bond income:

$100,000	AGI (municipal bond income is not a part of AGI)
- 50,000	deductions
$ 50,000	taxable income
$ 9,580	Federal tax
$ 2,868	Vermont tax before adjustment

The next step in the calculation would be to adjust the Vermont tax upward to account for the municipal bond income. But there is no percentage which can simply be applied to the Vermont tax. It would make no sense to increase the tax by a ratio of ten thousand (municipal bond

income) to one hundred thousand (Federal AGI), since the municipal bond income is not a part of the adjusted gross income. How much a person receives in municipal bond income is completely unrelated to that person's total Federal AGI. The problem is seen more clearly if the taxpayer has zero Federal AGI and the taxpayer has one hundred thousand dollars of municipal bond income. The taxpayer would pay zero Vermont tax, even with one hundred thousand dollars of bond income. No ratio can be applied to zero which will result in the correct amount of Vermont tax on the one hundred thousand dollars of municipal bond interest.

The reason that the adjustment method works for Federal interest, but the recomputation method is required for municipal bond income, stems completely from the fact that Federal interest is in Federal AGI, while the municipal interest is not. The Federal interest has been taken into the Federal tax calculation, and is therefore reflected in the Vermont tax figure. On the other hand, the municipal bond interest never enters into the Federal tax calculation, and is not reflected in the Vermont tax figure; as a result, no adjustment to the Vermont tax figure will account for that income.

As a result, there is no way to meaningfully adjust for municipal bond income; the only meaningful method is recomputation.

Second, the Vermont legislature, for the years 1989 through 1992, made adjustment the exclusive method for

removing U.S. obligation income from the tax calculation, by adding the last sentence of section 5822:

> This reduction of federal income tax liability by the percentage of the taxpayer's adjusted gross income which is not Vermont income shall be the exclusive method of calculating Vermont income tax liability; a taxpayer with adjusted gross income that is not Vermont income may not recompute the taxpayer's federal income tax liability to determine the taxpayer's Vermont income tax liability.[1]

Therefore, the recomputation method was not available to the taxpayers for determining their 1991 Vermont tax liability. The Department correctly applied section 5822 in determining the taxpayers' tax, and they have presented no evidence to the contrary.

2. The Department lacks jurisdiction to determine the constitutionality of the statutes it administers.

The taxpayers also contend that section 5822 itself is unconstitutional. The Department lacks jurisdiction to judge the constitutionality of legislation. Alexander v. Town of Barton, 152 Vt. 148, 151 (1989). The Department has, however, relied on both Vermont and U.S. Supreme Court cases in support of the constitutionality of the adjustment method. Wheeler v. State, 127 Vt. 361, 364 (1968); First

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[1] Prior to 1989, taxpayers were permitted the choice of the adjustment method or the recomputation method. As of January 1, 1993, taxpayers are again allowed the choice.

National Bank of Atlanta v. Bartow County Bd. of Tax Assessors, 470 U.S. 583, 593, 597 (1985); U.S. v. Atlas Ins. Co., 381 U.S. 233, 250 (1965).

Conclusion

As the taxpayers have failed to demonstrate that the Department incorrectly applied section 5822, and further, as the Department lacks jurisdiction to judge the constitutionality of the statutes it administers, the Department's adjustments and assessment are affirmed.

Dated this 23rd day of September, 1993, at Montpelier, County of Washington and State of Vermont.

STATE OF VERMONT
DEPARTMENT OF TAXES

/s/ _____
Emily Bergquist Tartter
Deputy Commissioner and
General Counsel

APPROVED BY:

/s/ _____ Date: September 24, 1993
Joyce H. Errecart
Commissioner of Taxes

STATE OF VERMONT

COMMISSIONER OF TAXES

IN RE: James E. Hirsch and Barbara S. Hirsch
Personal Income Tax
ATC-91-48

DETERMINATION

Introduction

Barbara and James Hirsch, appearing pro se, appeal the Department of Taxes' adjustments to their personal income tax liability and assessment for the years 1989, 1990 and 1991. Mary Bachman, Esq., represents the Vermont Department of Taxes, and Emily Bergquist Tartter serves as hearing officer at the designation of Joyce Errecart, Commissioner of Taxes. The appeal is submitted by the parties for determination without hearing, based upon a stipulation of facts filed with the Department.

The Department's adjustments and assessment are affirmed.

Findings of Fact

The following findings of fact are based upon the parties' stipulation of facts.

1. Taxpayers timely filed their 1989 Vermont income tax return, reporting Federal adjusted gross income of $79,930.71, and Federal taxable income of $68,070.28.

Included in their Federal income was $8,175.00 in interest from U.S. Treasury bills. They based the calculation of their 1989 Vermont income tax on recalculated Federal taxable income, reducing it by the amount of Treasury bill interest. From this they determined a recalculated Federal tax and entered this number, rather than their actual Federal tax liability, on line 1 of the Vermont return. Total Vermont tax paid (after an additional adjustment for an unrelated credit of $243.14) was $630.44.

2. The Department disallowed the taxpayers' recalculation of adjusted gross income, adding back the Treasury bill interest. Vermont tax was then figured on the actual Federal tax and adjusted for the percentage of income represented by the Treasury bill interest. (The Department also made an adjustment to the unrelated credit.) On June 14, 1990, the Department assessed the taxpayers an additional $210.80 in income tax.

3. The taxpayers paid the assessment on July 9, 1990, together with charges of $5.33, and noted on their check "paid under protest." They did not otherwise indicated their intent to appeal the assessment within the sixty-day statute of limitations provided in 32 V.S.A. § 5883. James Hirsch asserts that in a conversation with then-commissioner Hoyt, the commissioner advised him that he had three years to file for a refund of the tax paid.

4. Taxpayers filed a petition for refund of the $210.80 on June 13, 1991.

5. The Department does not concede that the taxpayers validly appealed the assessment for 1989, but agrees to treat that year as in appeal.

6. Taxpayers timely filed their 1990 Vermont income tax return, reporting Federal adjusted gross income of $68,382.90, and Federal taxable income of $57,199.07. Included in their Federal income was $7,851.00 in interest from U.S. Treasury bills. They based the calculation of their 1990 Vermont income tax on recalculated Federal taxable income, reducing it by the amount of Treasury bill interest. From this they determined a recalculated Federal tax and entered this number, rather than their actual Federal tax liability, on line 1 of the Vermont return. After accounting for withholding and estimated tax payments (and an unrelated credit for New York tax paid), the taxpayers showed an overpayment of $776.87, which they requested be applied to their next year's estimated payments.

7. The Department disallowed the taxpayers' recalculation of adjusted gross income, adding back the Treasury bill interest. Vermont tax was then figured on the actual Federal tax and adjusted for the percentage of income represented by the Treasury bill interest. As a result, the Department reduced the overpayment by $237.03 and notified the taxpayers of the adjustment on April 23, 1991.

8. Taxpayers filed a timely petition for redetermination of their tax liability for 1990.

9. Taxpayers timely filed their 1991 Vermont income tax return, reporting Federal adjusted gross income of $64,950.61, and Federal taxable income of $54,960.51. Included in their Federal income was $6,738.62 in interest from U.S. Treasury bills. They based the calculation of their 1991 Vermont income tax on recalculated Federal taxable income, reducing it by the amount of Treasury bill interest. From this they determined a recalculated Federal tax and entered this number, rather than their actual Federal tax liability, on line 1 of the Vermont return. After accounting for withholding and estimated tax payments (and an unrelated credit for New York tax paid), the taxpayers showed an overpayment of $318.78, which they requested by applied to their next year's estimated payments.

10. The Department disallowed the taxpayers' recalculation of adjusted gross income, adding back the Treasury bill interest. Vermont tax was then figured on the actual Federal tax and adjusted for the percentage of income represented by the Treasury bill interest. The Department also reduced the estimated tax payment claimed by $237.03, to reflect the adjustment to the 1990 overpayment. As a result, the Department reduced the overpayment by $479.63 and notified the taxpayers of the adjustment on May 4, 1992.

11. Taxpayers filed a timely petition for redetermination of their tax liability for 1992.

Conclusions of Law

The taxpayers do not dispute whether the Department correctly assessed them under applicable Vermont income tax law for the years at issue. Rather, they argue that the applicable Vermont income tax law is unconstitutional. Their claim is based upon their assertion that section 5822 of Title 32, as it read for the years at issue, illegally imposed a tax upon their U.S. obligation interest income, and further, that because similar taxation was not imposed on interest from State obligations, the State law at issue unconstitutionally discriminated against Federal obligations.

Vermont personal income tax is based upon a percentage of the taxpayer's Federal income tax liability. 32 V.S.A. § 5822. Because certain income taxable at the Federal level is not taxable by Vermont, the taxpayer's Vermont income tax liability must be reduced to account for those items of nontaxable income. One such item of income which may not be taxed by the State is interest income on U.S. government obligations. Title 31 U.S.C.A. § 3701.

There are two ways of adjusting for income not taxable by this State, the "adjustment method" and the recomputation method."

Under the adjustment method the taxpayer begins with actual Federal tax liability, applies the Vermont tax rate, and then reduces the resulting Vermont tax by the percentage of income which is U.S. obligation income (see example, page 7).

Under the recomputation method the taxpayer recomputes Federal tax liability by completing a mock-up Federal return, omitting from adjusted gross income the U.S. obligation interest. Deductions are applied against this lower adjusted gross income and a new Federal tax is then calculated. The Vermont rate is then applied.

At the time of this appeal, the adjustment method had been the exclusive method allowed by Vermont law since 1989, when the legislature added the last sentence of section 5822, which read:

> This reduction of federal income tax liability by the percentage of the taxpayer's adjusted gross income which is not Vermont income shall be the exclusive method of calculating Vermont income tax liability; a taxpayer with adjusted gross income that is not Vermont income may recompute the taxpayer's federal income tax liability to determine the taxpayer's Vermont income tax liability.[1]

Under the recomputation method the taxpayer will pay less State tax. This is due to the fact that the full amount of the taxpayer's deductions are allowed against a reduced amount of adjusted gross income (after the U.S. interest has been subtracted). Seen another way, under the recomputation method the deduction for U.S. interest is taken directly from the last dollars earned, which are taxed at the highest

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[1] Prior to 1989, the taxpayers were permitted the choice of the adjustment method or the recomputation method. As of January 1, 1993, taxpayers are again allowed the choice.

rate; under the adjustment method, the deduction for U.S. interest is taken proportionally from all dollars earned. The result is a greater value for the U.S. interest deduction under the recomputation method.

The following example shows the difference in tax results under the two methods:

> Example The following calculations assume a taxpayer with adjusted gross income of $100,000, including $10,000 U.S. obligations interest (10% of agi), and itemized deductions of $50,000; and an average Federal tax rate of 30% in both cases:

Adjustment method		Recomputation method	
$100,000	agi	$100,000	agi
- 50,000	deductions	- 10,000	U.S. interest
		- 50,000	deductions
50,000	taxable income	40,000	taxable income
15,000	Federal tax	12,000	Federal tax
x 28%		x 28%	
4,200			
- 10%	adjustment for $10,000 U.S. interest		
$3,780	adjusted Vermont tax	$3,360	recomputed Vermont tax

As mentioned above, the taxpayers do not dispute whether the Department correctly applied section 5822; rather, they contend that section 5822 itself is unconstitutional. The Department lacks jurisdiction to judge the constitutionality of legislation. Alexander v. Town of

Barton, 152 Vt. 148, 151 (1989). The Department has, however, relied on both Vermont and U.S. Supreme Court cases in support of the constitutionality of the adjustment method. See Wheeler v. State, 127 Vt. 361 (1968), (It was not unconstitutional to determine a non-resident's Vermont tax liability by taking into account his non-Vermont income; ". . . Vermont income is being taxed at an increased rate, and nothing more." Id. at 364); First National Bank of Atlanta v. Bartow County Bd. of Tax Assessors, 470 U.S. 583, 105 S. Ct. 1516 (1985), (". . . a pro rata method of allocating a fair share of the Federal obligations to liabilities does not infringe upon the constitutional or statutory immunity Federal obligations enjoy." 470 U.S. at 597). See also U.S. v. Atlas Ins. Co., 381 U.S. 233 (1965) ("We affirm the principle announced in Denman and Independent Life that the tax laws may require tax-exempt income to pay its way." Id. at 247.).

If under these cases there is in fact no State taxation of Federal obligation interest, then the taxpayers' second question, of whether the State's taxation of Federal obligation interest is discriminatory, is no longer an issue. If there is no tax, there is no discriminatory tax.

As the parties agree, however, that the Department properly applied section 5822, and further, as the Department lacks jurisdiction to judge the constitutionality of the statutes it administers, the Department's adjustments and assessment are affirmed.

Dated this 16th day of July, 1993, at Montpelier, County of Washington and State of Vermont.

STATE OF VERMONT
DEPARTMENT OF TAXES

/s/
Emily Bergquist Tartter
Deputy Commissioner and
General Counsel

APPROVED BY:

/s/
Joyce H. Errecart
Commissioner of Taxes

Date: July 16, 1993